Supreme Court, U.S.
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No. 01-1318

In The
Supreme Court of the United States

BZAPS, INC.,

Petitioner,

vs.

CITY OF MANKATO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This Supplemental Brief is submitted pursuant to Supreme Court Rule 15.8 to respond to Petitioner's Supplemental Brief with respect to the Court's recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. ___, 122 S.Ct. 1728 (2002).

ARGUMENT

This Court's decision in *Alameda Books* has no bearing on this case and, contrary to Petitioner's contention, does not constitute the basis for either granting certiorari to review the Eighth Circuit decision on the merits or to grant certiorari and remand the case to the Eighth Circuit.

Alameda Books involved an amendment to Los Angeles' adult establishment ordinance that prohibited more than one adult entertainment business in the same building. 122 S.Ct. at 1731. In enacting its original adult establishment ordinance, the city relied only on its own 1977 study of adult businesses. *Id.* at 1732. That study concluded that concentrations of adult businesses produced higher rates of crimes. *Id.*

In *Alameda Books*, the district court granted summary judgment to the plaintiffs on the basis that the city's ordinance was a content-based regulation of speech that failed the strict scrutiny test. *Id.* at 1733. The Ninth Circuit affirmed, but on different grounds. It held that even if the amendment to the city's adult establishment ordinance was content neutral, the city failed to demonstrate that the regulation was designed to serve a substantial governmental interest. *Id.* Specifically, the Ninth

Circuit found that the city failed to produce evidence upon which it could reasonably rely to demonstrate a link between multiple adult businesses in the same establishments and negative secondary effects. *Id.*

The plurality opinion in *Alameda Books* affirmed the principle established in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986). If a city establishes that its ordinance serves an important government interest, the city does not need to establish that some other type of regulation might also serve that interest. *Id.* at 1736. The Court "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id.* The plurality decision essentially restates the principle articulated in *Renton*.

In his concurring opinion, Justice Kennedy concluded that *Renton* requires an intermediate level of review, not strict scrutiny. Justice Kennedy concluded that the ordinance was not invalid on its face and therefore should have survived summary judgment.

Petitioner places much weight on the fact that the City's zoning administrator testified in his deposition that the City had no evidence that periodic performances of nude dancing would cause adverse secondary effects. Petitioner's arguments are misguided. The reason why the zoning administrator testified the way he did is that, unlike Los Angeles, the City had never done its own study. Rather, the City relied on studies done by other cities. The City had no empirical data of its own and, as the Court held in *Renton*, was not required to do its own empirical study.

The studies relied upon by the City when it adopted its ordinance clearly supported the conclusion that adult

cabarets caused adverse secondary effects. Petitioner cannot escape from the ordinance simply by claiming that it only wants to "periodically" operate an adult cabaret. Such an exception would make a mockery of the ordinance. It would, for example, allow the typical neighborhood convenience store to convert into an adult bookstore every Saturday because the City had not shown that operating an adult bookstore one day a week caused adverse secondary effects.

Petitioner apparently concedes that it cannot operate an adult cabaret on a year-round basis. The reason for that is that the studies relied upon by the City clearly demonstrate that those types of businesses have the potential to cause adverse secondary effects. Nevertheless, Petitioner contends that the City must demonstrate by empirical evidence that periodically operating a business as an adult cabaret would have the potential for causing adverse secondary effects. Nothing in *Renton* or *Alameda Books* supports that argument.

The issue in this case is whether a business can ignore the City's constitutionally valid adult use ordinance by only periodically operating as an adult use. The Eighth Circuit correctly concluded that the facts in *Alameda Books* were not relevant to this case. (A-5) The reason for that conclusion was that in this case, unlike *Alameda Books*, the City relied upon evidence directly relating to the adverse effects of nude dancing and could therefore reasonably conclude that periodic performances of nude dancing would have the similar effects. (A-6) The Eighth Circuit also correctly concluded that the City's ordinance

on its face differed in no relevant respect from the ordinance upheld in *Renton*. (A-3)

CONCLUSION

Alameda Books has no impact on this Court's decision on the petition for writ of certiorari. The City respectfully requests that the Court deny the petition.

Dated May 31, 2002

Respectfully submitted,

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